IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 256.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

HEMAN CLARK,
Respondent.

Reply to Brief of Respondent.

Believing that this court would in this case review only the questions considered and passed upon by the court below, we did not deem it necessary to discuss or consider in our principal brief any other questions than were decided by that court. Counsel for respondent have in their brief, raised other questions, and while we insist that this court, as this case now comes before it, cannot properly consider, and will not consider any other questions than those passed upon by the court below, we have thought it proper to file this brief in reply.

FIRST.

This court has power to review and revise the rulings and decisions of the referee, in matters of law, as embodied in and made the findings, rulings and decisions of the Circuit Court, and the judgment entered thereon by the court upon the hearing before it, upon the report of the referee and the exceptions thereto, and the case and bill of exceptions, and the assignments of error, at least so far as to determine whether the finding of fact made by the referee and adopted by the court, support the conclusions of law, or authorized the judgment entered against the Railway Company.

The doubt expressed by this court in *Boogher vs. Life Ins. Co.*, 103 U. S. (13 Otto.), 90, as to "whether cases tried in the Circuit Courts by a referee, in States where such a practice exists," could be reviewed by this court, notwithstanding the Act of June 1, 1872 (17 *Stat.* 196, *ch.* 255; *Sec.* 914, *U. S. R. S.*), which provided for conforming the practice, pleadings, forms and modes of proceedings in civil cases, other than equity and admiralty causes, in the Circuit and District Courts, as near as may be to the practice pleadings, forms and modes of proceeding existing in like causes in courts of record of the State, has been removed by a number of subsequent decisions, allowing writs of error in such cases, and entertaining and reviewing questions of law arising therein, upon reports and findings of a referee, in cases referred, pursuant to State practice, and the rules of the Circuit Courts, and revising the action of the Circuit Court upon such reports of a referee, by

either reversing or modifying the judgements entered thereon.

Paine vs. Central R. R. Co., 118 *U. S.*, 152.
Roberts vs. Benjamin 124 *U. S.*, 64.
Shipman vs. Mining Co., 158 *U. S.* 356.

In the *Boogher* case, page 97, this court said that if the facts found by the referee were confirmed by the court upon a hearing upon the referee's report, and exceptions to it, they might be treated as the findings of the court; and, in such case, they could be considered and made the foundation of review of the questions of law raised on them in the record, upon exceptions to the overruling of objections to the referee's report.

In the case at bar the findings and conclusions of the referee were made the findings and conclusions of the Circuit Court. (Rec., p. 224.)

Section 700, U. S. R. S. (*Act.* 1865, *ch.* 86 *Sec.* 4), provides for a review, on writ of error, by this court of cases where an issue of fact in a civil cause has been tried by the court without a jury, of the rulings of the court in the progress of the trial, upon a bill of exceptions; and when the finding is special, for extending the review to the determination of the sufficiency of the facts found to support the judgment, "whenever the parties, or their "attorneys of record, file with the clerk a stipulation in "writing waiving a jury."

This court in the *Boogher* case further held that "*the "consent to a reference necessarily implied a waiver of a jury.*" Such consent by the attorneys of record of the parties in this case was in writing, filed with the clerk (*Record, pp.* 46-48, *fols.* 137-143), and the judgment, or order for judgment, entered upon the hearing, upon the

referee's report, by the Circuit Court, without a jury, recited that "*a trial by jury having been expressly waived by "the written consent of the parties duly filed with the clerk "of the court.*" (*Record, p.* 221, *fol.* 662.)

In *Heckers vs. Fowler* (2 *Wall.*, 123), it was said that where, in a case tried before a referee, upon consent of the parties, and order or rule of the court, his report has been made and *accepted*, it will be the proper foundation for a judgment. "Judgment, however (the court said), cannot, "in general, be entered in conformity to the report or "award, *until it is accepted or confirmed by the court.*" "*Such a report of referees is in many respects a substitute "for the verdict of a jury. Where there is no agreement to "that effect, no judgment can be entered on such a report "until the same has been accepted.*"

The conclusion of the court was that the equity of the statute allowing a bill of exceptions in courts of common law embraces all such judgments *or opinions of the court*, arising in the course of a cause as are the subjects of revision by an appellate tribunal, and *which do not otherwise appear on the record;* and that a bill of exceptions would lie, upon writ of error, to exceptions to the ruling of the court overruling objections to a referee's report and rendering judgment thereon in accordance therewith.

Allusion is made to the fact that appellate courts in other jurisdictions are accustomed to revise such judgments and opinions, and the court said: "Upon principle we can see "no objection to the introduction of the same practice in "the courts of the United States, under the limitations," that the Supreme Court cannot determine in cases at common law the weight or effect of evidence, nor decide mixed questions of law or fact. Whenever a report of referee is presented and before it is accepted, the party against whom

it is made may object to its acceptance; and, if required, reduce his objections to writing and file them in the case. "Hearing is then had, and after the hearing the court may "accept or reject the report; or the report may, for "good cause shown, be recommitted" (2 *Wallace* 131), as was done in this case.

In *Paine vs. Central Vermont R. R. Co.* (118 U. S. 152–158, May, 1886,—some time after the case of *Boogher vs. Ins. Co.* (103 U. S., 90), it was held by this court that in an action in the Circuit Court submitted by stipulation of the parties, in accordance with the practice prevailing in the State where the court is held, to the decision of the judge, "*as a referee*," it would, upon a writ of error, consider the question, *whether there was any error of law in the judgment rendered by the court, upon the facts found by the referee.*

This would clearly warrant the examination and determination of the questions presented in this case by the exceptions filed to the decision and judgment of the court in several forms, and the assignments of error, that judgment in favor of the plaintiff below was not warranted, as matter of law, upon the facts found by the referee; but that the defendant rather was entitled to judgment in its favor upon the facts so found.

Record, pp. 222, 223, fols. 666, 667; p. 224, fols. 671, 672; p. 228, fol. 682; p. 479, fols. 1435, 1436–1440, etc.

This Court, in *Paine vs. Central Vt. R. R. Co.*, fully reviewed and passed upon the questions of law presented by the findings of the Judge "*as referee;*" and in *Roberts vs. Benjamin*, 124 *U. S.* 64 (1888), the judgment entered upon "or pursuant to the report of the referee" appointed "to determine the issues" before whom the case was tried, was reviewed by this court, as to questions of law, arising upon

the facts found by the referee; *and as to whether the facts found warranted the judgment.*

And again in *Shipman vs. Mining Co.*, 158 *U. S.*, 356, as late as May, 1895, this court reviewed the decision of the Circuit Court upon the report and findings of a referee, to whom the case had been referred by consent, in open court, *and reversed the judgment* entered upon the report of the referee. The court held *that where the findings of the referee had been ordered to stand as the findings of the court*, as was done in the case at bar, it would consider whether the facts found by the referee sustained the judgment.

A similar practice has long prevailed in the Circuit Courts of the United States.

In *Sicard vs. Buffalo, N. Y. & P. Ry. Co.*, 16 *Blatch*, 525 (*U. S. Circt. Ct., Northn. Dist. N. Y., Jan., 1879*, BLATCHFORD, J.), upon a writ of error to the *District* Court, where the judgment of that court was based on the report of a referee, it was held, that the findings of fact made by the referee were conclusive in the Circuit Court, but that his conclusions of law could be questioned so far as they are challenged by exceptions filed in the District Court.

> It appeared that after the cause was at issue it was referred, by consent of counsel for both parties in open court, *to a referee, to hear, try and determine the same*, the order of reference providing that, on filing the report of the referee, judgment might be entered thereon, on application to the court at any time. The referee reported in favor of the plaintiff. The defendant filed exceptions to the findings and decisions of the referee. *The report and exceptions were brought before the court, and it made an order overruling the exceptions and confirming the report*, and ordering that judgment be entered for the plaintiff in accordance with the report.

> The Court said: "The only question on the record is, whether the report of the referee ought to be sustained, as against the exceptions filed. The findings of fact made by the referee are conclusive. Only his conclusions of law can be questioned, and that only so far as they are challenged by the exceptions filed in the court below. (*p.* 526.)

The court thereupon stated in detail what the findings of the referee as to the facts were (pp. 526-7-8); and what were his conclusions of law and decision, and the exceptions thereto; and reviewed the decision fully. (*pp.* 529-31.)

And in *Tyler vs. Angevine*, 15 *Blatch.*, 536 (*Same Circuit, Feby.*, 1879. BLATCHFORD, J.), substantially the same thing was held: That the conclusions of law and decisions upon findings of facts by a referee could be reviewed on writ of error.

It was a suit at law and it was referred to a referee, "to hear, try and determine the issues" therein. The court said (p. 543): "*The referee, as to the finding of facts, stood in the place of a jury.*"

The case was reviewed at great length, as to the law and decision of the referee upon his findings of fact, as well as to questions of evidence. (*pp.* 537, 545, 549.)

In *Town of Lyons vs. Lyons Nat. Bank*, 8 *F. R.*, 369, (*Circuit Court, N. D. N. Y., May*, 1881, BLATCHFORD, C. J.): the attorneys for the respective parties to a suit at law, brought in the *District Court* of the U. S., by a written stipulation waived a jury trial, and agreed that the court should hear the action "without a jury." The action was tried, a written decision was filed, finding certain facts and

certain conclusions of law thereon, and a judgment entered. The cause was afterwards taken to the Circuit Court on writ of error, and, although the Court held that the rulings or findings of fact, and the conclusions of law connected therewith were not open to revision, as facts so found were found in a way unknown to the common law, nor yet provided by statute, "inasmuch as there is no statutory provision in respect to *District Courts* for the waiver of a trial by jury," while there was such a provision in respect to *Circuit Courts* in Section 649, U. S. R. S.; the court, however, said:

> "*The above views do not interfere with the right to have a trial by a referee in a suit at law, by consent, in the District Court, or with the power of the Circuit Court, on a writ of error, to revise the proceedings on the trial before the referee on proper papers.* This was done by this court (U. S. Circuit) in *Sicard vs. Buffalo, etc., Ry. Co., 15 Blatchfd.*, 525, and in *Tyler vs. Angevine, Id.*, 536."
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> "*This practice is founded on the view held by the Supreme Court, that the referring of actions under a rule of court, by consent of parties, was well known at common law, and as well established and as fully warranted by law as actual trial by jury.*"

Quoting

Alexandria Canal Co. vs. Swan, 5 How., 89.

York, etc., R. R. Co., vs. Meyers, 18 How., 246.

Heckers vs. Fowler, 2 Wall., 123.

See also

Robinson vs. Life Ins. Co., 16 Blatchfd., 194, 201.

In *Dexter vs. Sayward*, 66 *F. R.*, 265-268 (*U. S. Circuit Court, Washington, 1894*), the case came up for hearing in the Circuit Court, on exceptions to the report of a referee, to whom the case had been referred to hear and

determine the issues; and the court re-examined the findings of the referee, both as to the facts and the law, and the exceptions were overruled before judgment was directed to be entered.

This same case came up in the Circuit Court of Appeals (9th Circt., February, 1896), 72 *F. R.*, 758-762, under title of *Sayward vs. Dexter*. No question was raised as to the correctness of the practice below in the trial of the case before the referee, or as to the bringing up of the decision of the court upon the referee's report, by writ of error; and the court reviewed the questions raised upon the writ of error and the judgment. The court said, "The "cause was, on the written stipulation of the parties, sent to "a referee, who reported findings of fact and conclusions of "law," and that defendant was indebted to plaintiff as upon an account stated in the sum of $130,308, with interest. Both parties filed exceptions to the report, *which were heard by the court*. The findings of fact by the referee were adopted by the Circuit Court, *but his conclusions of law were modified*, the court holding that the plaintiff was entitled to recover $153,128 with interest, making $192,-627, instead of $130,308, for which judgment was entered; thus increasing the amount of the recovery directed by the referee; and this was affirmed by the Appellate Court.

See also *Shipman vs. Coal Exchange*, 70 *F. R.*, 652 (Circuit Court of Appeals, 6th Circt., 1895).

In *North American Loan & Trust Company vs. C. & U. S. Mortgage Co.*, 76 *F. R.*, 623 (U. S. Circt. Ct. Dist., South Dakota, October, 1896), RINER, D. J., said:

> "This case is before the court upon the motion of plaintiff to confirm the report of the referee, and to enter judgment thereon, and upon exceptions filed by the defendant to the findings of fact and conclusions

of law made by the referee. *A trial before a referee is conducted in the same manner as a trial before the court.* To obtain a review of the evidence and proceedings, exceptions taken to any order or ruling made by the referee should be embodied in a bill of exceptions, *signed by him. He is the proper party to sign a bill of exceptions, and not the judge making the order of reference.*"

"It is well settled that an objection or exception based upon the contention that the findings are against the weight of evidence cannot be considered by the court, *unless the entire evidence is preserved by a bill of exceptions taken before the referee.*

"No bill of exceptions having been taken before the referee, the only question which can be considered by the court is what judgment should be rendered upon the findings of fact made by the referee."

The court thereupon reviewed the findings of the referee, and said: "Being unable to concur with the referee "in the conclusions of law made by him, I am constrained "to sustain the exceptions taken thereto, and to enter "judgment upon the facts found by him in favor of the de-"fendant;" thus reversing the decision of the referee.

This decision was reviewed by the U. S. Circuit Court of Appeals in the Eighth Circuit(*Dec.. 1897*) upon a writ of error from the judgment entered in the Circuit Court upon it.

N. A. L. & T. Co. vs. C. & U. S. Mfg. Co., 83 *F. & R.*, 796-803.

The court reviewed all the findings of the referee as to the facts, so far as they affected his conclusions of law, and the decison of the Circuit Court thereon; and modified the judgment, and as modified, affirmed it.

The court further held, as did the Circuit Court, that two findings made by the referee, designated as findings of

fact, were "essentially conclusions of law, and in no sense findings of fact"—"merely conclusions drawn by the referee" from the facts detailed, and that the conclusions thus drawn were erroneous.

In *Insurance Co. vs. Boon*, 95 *U. S.* (5 *Otto*) 117, it was held that a judgment entered upon special findings of fact, which belonged to the record as fully as does the verdict of a jury, were subject to review without a bill of exceptions

SECOND.

The suggestion that this action was tried before the referee as a common-law arbitrator, is without foundation.

Neither party for a moment supposed during the trial of the action the referee was acting as a common-law arbitrator; nor did the referee himself have any such idea. Neither party would have proceded with the reference if they had so understood.

Both parties believed that they were conducting a trial before the referee in accordance with the practice in the State courts; and that such trials were authorized in the United States Circuit Court by virtue of the provisions of the Act of June 1, 1872 (*See* 914 *U. S. R. S.*), which enacts that the practice, pleadings, forms *and modes of proceeding* in civil cases, other than equity and admirality causes, in the Circuit and District Court shall conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing in like causes in the courts of record of the States where such Circuit and District Courts are held. (17 *Stat.* 196, *Ch.* 255.)

This is apparent, from the statement of the referee in his first report (*Record, p.* 50, *fol.* 148), that the requests to find submitted by each of the parties at the close of the trial before him, were "unnecessary under the present practice;" and, also, by his statement of his "conclusions of fact and law" together, in accordance with the provisions of Section 1022 of the N. Y. Code of Civil Procedure, as amended in 1895, (to which he undoubtedly alluded as the "present practice"): which authorized the court or referee, before whom a case is tried without a jury, to "file a decision stating concisely the grounds upon which the issues have been decided, and direct the judgment to be entered thereon," instead of stating separately the facts found and his conclusions of law; thereupon the Appellate Court shall, upon exceptions filed to the decision and upon appeal from the judgment, review all questions of fact and law, and may reverse or modify the judgment, &c.

Such references are also directly sanctioned by the rule of the United States Circuit Court for the Southern District of New York of February 5, 1877, in pursuance of which consent to the reference in this case was made by both parties, and in accordance with its terms.

This was not a common-law reference at all, but a refference under the statutes of the United States which adopted and authorized the "*modes of proceeding*" existing in like causes in courts of record of the State, and pursuant to a rule of the court.

THIRD.

The written consent to the reference or to the trial before the referee was a sufficient "stipulation in writing waiving a jury trial," within Section 649 U.S. Revised Statutes.

This was distinctly and directly decided by this court in *Boogher vs. Ins. Co.* (103 *U. S.* 90), where the court held that "*the consent to a reference necessarily implied a waiver of a jury;*" and, as the consent to the reference in this case was in writing, filed with the clerk, the stipulation waiving a jury trial was in writing.

References under the N. Y. Code of Civil procedure can only be made in the State courts, "upon the consent of the parties manifested by a written stipulation signed by their attorneys and filed with the clerk," except in special cases. (*Code C. P. Secs.* 1011, 1012 *and* 1013).

The question in *Kearney vs. Case*, (12 Wall.; 97 U. S., 275) was whether there was any consent in writing at all in that case, filed as required, waiving a jury trial. The court held that it did not appear by the record there, that there had been such a written consent; but that it appeared affirmatively to the contrary.

While the court held that there could be no review of the rulings of the court, unless the record showed that such a consent was signed and filed, it also held that the existence of such a writing may be shown either by a copy of the agreement or by a statement to that effect in the record entry of the judgment. The court said: "If, for in-"stance, it is stated in the findings of fact by the court, or

in the bill of exceptions, *or in the record of the judgment entry*, that such a stipulation was made in writing, *the record would show that the condition in which a review is allowed existed*, and we would not feel at liberty to contradict the record in this respect."

The court's discussion of the effect of the trial in that case, referred to in brief of respondent's counsel, was based upon the conclusion that there was no consent in writing waiving a jury in that case.

In the present case, not only was the consent to the reference in writing duly filed, which, as this court held in *Boogher vs. Ins. Co.* (103 U. S., 97), "*necessarily implied a "waiver of a jury*," but the judgment itself distinctly recited that "*a trial by jury having been expressly waived by the "written consent of the parties, duly filed with the clerk of the "court.*" (Record, p. 221, fol. 662).

This recital and entry were expressly approved and consented to by the plaintiff below, or his attorneys, in their approval of and consent to the judgment (p. 226; fol. 677); **and amounted to a consent waiving a jury, or to an admission that the consent to the reference contained a stipulation in writing that a trial by a jury had been expressly waived.** He ought not to be now permitted to contradict it.

The decision in the case of *Campbell vs. Boyreau* (21 *Howard*, 223) (December, 1858), so often referred to and so much commented on, was prior to the act of March 3, 1865 (*Chap.* 86, *Stats*, *Vol.* 13, *p.* 501, *Secs.* 649 *and* 700, *U. S. R. S.*), authorizing trials by the court without a jury, where the written stipulation waiving a jury is filed, and empowering the Supreme Court upon a writ of error to ex-

tend the review "*to the determination of the sufficiency of the facts found to support the judgment.*"

In *Fleitas vs. Cockrem*, 101 *U. S.* (11 *Otto*), 301, it was held that a "statement in the record that an issue was "called for trial by the court, the jury having been waived "in writing, is, in the absence of anything to the contrary, "conclusive that the requisite agreement for such trial was "made."

In the *Boogher* case (103 *U. S.*, 97) the court said: "It "nowhere expressly appears in this case that a stipulation "was filed, but inasmuch as an action of this kind could "not, under the practice act of Missouri, be referred with- "out the written consent of the parties, and this was re- "ferred by consent, we think we must assume that a con- "sent was given in such form as to authorize what was "done under it. The withdrawal of a juror after the trial "was begun and the consent to a reference *necessarily im- "plied a waiver of a jury*, and as this consent to be avail- "able must have been in writing, it follows that the waiver "which flowed from the consent was also in writing. We "think, therefore, that it sufficiently appears that the stipu- "lation which the Act of Congress requires was entered "into." And under the state practice in New York the consent to the reference was required to be in writing, as before stated. (*Code, Sec.* 1011.)

In *Supervisors vs. Kennicott* (103 U. S., 554-556) it was held that a stipulation signed by the parties or their attorneys, and filed with a clerk of the Circuit Court, submitting a civil cause for trial on an agreed statement of facts, is "a stipulation in writing waiving a jury" within the meaning of Section 649 of the Revised Statutes; and also that the court has authority, under Section 700 of the Re-

vised Statutes, to determine, as in case of a special verdict, "*whether the facts set forth in such statement are sufficient in* "*law to support the judgment, although the finding of the* '*Circuit Court on them in form be general.*"

The court, per Mr. Chief Justice WAITE, said:

"As the case could not be submitted to the court for 'trial without waiving a jury, a stipulation to submit, "especially if it be on agreed facts, is in itself a sufficient "waiver to meet the requirements of Section 649."

In *Bond vs. Dustin* (112 *U. S.*, 604), while it was held that in actions referred by rule of court *to an arbitrator*, only rulings and decisions in matters of law, after the return of the award, are reviewable, it is also held that the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the finding of facts by the court, or in the record of the judgment entered, that such a stipulation was made in writing; as was held in *Kearney vs. Case* (12 *Wall.*, 283, 284) and *Dickinson vs. Planters' Bank* (16 *Wall.*, 250); and the decision in *Boogher vs. Insurance Co.* (103 *U. S.* 90), holds that an order of reference expressed to be made by consent of parties necessarily implies that such consent was in writing, and that such consent was a sufficient stipulation in writing, waiving a jury.

Besides, the questions sought to be reviewed in this case do relate to rulings and decisions in matters of law *after the return of the award*, which are reviewable anyhow.

In *Shipman vs. Mining Co.* (158 *U. S.*, 356-359), there was not even a written consent to the reference or waiving a jury; yet the court held that the question was before the

court whether the facts found by the referee sustained the judgment.

In *Board of Commissioners vs. Sherwood*, 64 *F. R.*, 103 *and* 105, (Circuit Court of Appeals, 8th Circt.. Oct., 1894), where a jury was waived by stipulation, and the case referred to a referee for trial, he filed a report containing his findings of fact and conclusions of law; and the court "adopted each finding of facts made by the referee as findings of fact made by the court." The Appellate Court treated the case precisely as if it came up on a special finding of facts made by the trial court, and held that the questions open for review were those which might have been reviewed if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had made a special finding of the facts.

In *Shipman vs. Coal Exchange*, 70 *F. R.*, 652 (Circuit Court of Appeals, 6th Circuit, Nov., 1895), it was held that upon the review and confirmation of a Master's report, to whom the case was referred, the question open was whether there was any error of law in the judgment so entered, upon the facts found by the court, although there was no stipulation in writing waiving a jury trial.

In *Wesson vs. Saline County* 73 *F. R.* 917 (Circuit Court of Appeals, 7th Circuit, 1896), the court held that the question for review upon a special verdict or finding, is whether the facts found are sufficient to support the judgment. It also held that a special finding, like a general finding or verdict, is in itself a part of the record, without being embodied in a bill of exceptions.

In the case of *Paine vs. Central Vermont R. R. Co.*, 118 *U. S.*, 152, there was no written stipulation waiving a jury, in terms; but it appeared that the counsel of the parties signed and filed an agreement in writing by which it was "stipulated and agreed to refer this case to Hon. Hoyt H. Wheeler *to try and decide this case as referee*," as the record states (118 *U. S.* 153). This was pursuant to the laws and practice in the State of Vermont where the cause was pending in the U. S. Circuit Court. The referee filed his report, which was more in the nature of a general statement than of formal finding of fact, signed "Hoyt H. Wheeler, Referee" (pp. 153-156). The record then stated, that afterwards "said cause came on for trial upon the report of the referee before Hon. HOYT H. WHEELER, District Judge, &c., and after hearing the arguments of counsel for the plaintiff and defendant the court filed its decision in said cause, rendering judgment for the defendant" being the opinion reported in 14 Fed. Rep., 269. There was apparently no making the findings of the referee to be the findings of the court.

This court, by Mr. Justice GRAY, said: "This case was not submitted to the decision of the court without a jury, pursuant to the Revised Statutes of the United States, Sections 649, 670, but to the decision of the judge *as referee*, in accordance with the statutes and practice of Vermont. The only question presented by the writ of error, therefore, is *whether there is any error of law in the judgment rendered by the court upon the facts found by the referee.*" (118 *U. S.*, 158).

See also *Ryan vs. Carter*, 93 *U. S.*, 81.

It was thus held that whether there is any error of law in the judgment rendered by the court, upon the facts found by the referee, might be enquired into and reviewed by the

Appellate Court, even where there are no special findings of fact by the court, and where there was no written waiver of a jury filed except as contained in an agreement to refer to a referee to try and decide, or determine.

FOURTH.

The suggestion that the judgment entered below, upon the direction of Judge Brown, was entered or directed by consent of the parties, is a perversion of the facts and the record.

The fact that *the form* of the judgment was approved by the defendant's attorneys, does not show that it was entered by consent. The judgment itself shows that it was opposed (*Record, p.* 224, *fol.* 671).

Whether Judge Brown heard the parties formally or informally, is immaterial.

The very object of the parties in putting the judgment in the form in which it is, was, as avowed at the time, to so make it and shape it that it would be subject to review, by making the rulings and decision of the referee the rulings and decision of the court.

Upon the judgment or order for judgment, signed by Judge Brown and the judgment entered in pursuance thereof, the point clearly arises, whether it was not a question or error of law, arising after the filing of the referee's report, for the court to overrule the defendant's exceptions to the referee's report, to confirm the report of the referee, and make it the judgment of the

court; and to enter the judgment thereon which was entered in favor of the plaintiff below against the defendant for $88,084.86.

FIFTH.

The intimation that the hearing or proceeding before Judge Brown, which resulted in the entry of the judgment of April 6, 1898, was simply a motion for a new trial under the rule of the court, is equally without foundation.

Nowhere in the record of the decision, or order or judgment of Judge BROWN, is there a statement or suggestion that the defendant below made any motion for a new trial.

What the record does show, is, that upon the report of the referee and the exceptions filed thereto by the defendant below, and upon the case and bill of exceptions allowed by the referee, the plaintiff moved and applied for judgment upon and in accordance with the reports of the referee, notwithstanding the several exceptions filed by the defendant, and the case and bill of exceptions; and at the same time the defendant moved to set aside each of the reports of the referee, and for judgment thereon for the defendant, on the several grounds (1) *that the findings of fact made by the referee, as contained in his report filed on the 18th of February, 1898, did not authorize said judgment for the plaintiff;* (2) *that the referee's conclusions of law, as set forth in his report, were not sustained by any finding of fact therein set forth;* (3) that the referee's

conclusions of law were erroneous; (4) that the referee's findings of fact as to the first cause of action entitled the defendant to judgment dismissing the complaint as to that cause of action; and (5th) that the referee's findings of fact as to the cause of action for lumber alleged to have been used by the defendant were not sustained by the evidence, and that there was no evidence to support said findings of fact. (*Record, pp.* 222-3, *fols.* 666-7.)

There is no suggestion of a motion for a new trial there; but a motion by the plaintiff for judgment in accordance with the report of the referee; and a motion by the defendant for judgment thereon for the defendant on the several grounds stated.

It also appears by the judgment, or order for judgment, that the counsel for the defendant requested the court to find as matters of fact, and to decide as conclusions of law, each and every of the several statements of fact and the several propositions of law stated in the several requests to find and decide, submitted by the defendant to the referee, and annexed to and made a part of his report; and that the court refused to make or give any or either of the said findings of fact, or any or either of the several conclusions of law, which, as stated in the referee's report, were refused by the referee; and adopted, allowed and gave or made each and every such finding of fact and conclusion of law as had been made and allowed or given by the referee. (*Record, p.* 223, *fols.* 568-9.)

The court below, therefore, by this proceeding, made each of the findings of fact and conclusions of law of the referee the findings of fact and conclusions of law of the court; and refused each and every of the requests to find and decide as conclusions of law, which were made and

requested by the defendant of the referee; so that the findings of fact and conclusions of law of the referee were made and became the findings of fact and conclusions of law of the court, as if the case had been tried by the court before a judge without a jury, a trial by jury having been expressly waived by a written consent of the parties, duly filed with the clerk.

Thereupon, as the judgment shows, the court, "*having heard counsel for the respective parties, and due deliberation having been had thereon,*" it was ordered and determined that each and every of the several exceptions taken and filed by the defendant to the reports of the referee, *and to each of them*, and to each and every of the several findings of fact and conclusions of law made by the referee, as contained in his said report or reports, and each and every of the several exceptions taken and filed by the defendant to the several refusals of the referee to find and decide, as severally requested by the defendant, as to which findings, conclusions and refusals the defendant had made and filed exceptions, were overruled; and each and every of the rulings and decisions of the referee in and upon the trial of the action, *as contained and appearing in the case and bill of exceptions*, and the decisions, findings of fact and conclusions of law of the referee as stated and contained in his reports, were made the ruling decision, findings of fact and conclusions of law of the court in action. (*Rec., pp.* 223-224, *fols.* 669-70.)

The whole record of the proceedings before the referee, including the statement of the proceedings contained in the case and bill of exceptions, was thus made the record of the proceedings, rulings and decisions of the court as upon a trial by it; and the court thereby adopted the case and bill of

exceptions made and settled by the referee, as a record of the proceedings in the action had before it, and adopted the rulings therein contained as the rulings and decisions made by the court.

The decision or judgment signed by Judge BROWN further shows that the defendant's motion for judgment in favor of the defendant upon the report of the referee, and to set aside the report of the referee, and for judgment dismissing the complaint in the action, which, as appears in the previous part of the record, had been made by the defendant upon the grounds before stated (*fols.* 666-67), was denied; to which denial the defendant duly excepted (*fol.* 671.)

Thereupon it appears that upon motion of the attorneys for the plaintiff, *the defendant opposing*, it was ordered that the plaintiff recover of the defendant the sum of $80,479.35 with interest, together with the costs, etc., of the action. (*Rec., p.* 224, *fol.* 672.)

The decision and judgment also show that thereupon the defendant moved for an arrest of judgment in the action on the grounds stated, namely (1), that the plaintiff was not entitled to judgment upon the complaint therein, as to the first cause of action, upon the facts found, or the findings of fact made by the referee and by the court, as stated in the report of the referee, which was made the findings and decision of the court; (2) that as to the first cause of action, the right of the plaintiff to recover the two sums of $9,558.63 and $40,000, mentioned in the referee's report, was barred by the receipt or acknowledgment of March 9, 1888; (3) that the plaintiff was not entitled to judgment upon the complaint as to the first cause of action, inasmuch

as the award of said judgment to the plaintiff constituted a judgment of recovery for equitable relief in an action at law; and (4) that the plaintiff was not entitled to judgment upon the complaint as to the cause of action for the recovery of the value of certain lumber alleged to have been taken by the defendant railway company, for the reason that the cause of action therefor is one which could not be united with the other causes of action stated in the original complaint; which motion, or motions, and each part of them, were denied; to which denial the defendant excepted. (*Rec., pp.* 224-6, *fols.* 672-6.)

There was not anywhere a suggestion of a motion for a new trial, but rather of a motion or motions for judgment for the defendant upon the referee's report upon the grounds stated, which were principally that the findings of fact made by the referee and adopted by the court did not authorize the judgment which was awarded to the plaintiff; but did warrant a judgment for the defendant; and to all the decisions of the court the defendant duly excepted. (Rec., pp. 226-28, fols. 678-83.)

The judgment or *postea* signed by the clerk does not anywhere recite or state that any motion for a new trial was made, but it does state that the defendant had filed exceptions to the report of the referee and that such exceptions had been overruled and "*the judgment of the said referee confirmed and made the judgment of this court.*" (Rec., p. 229, fol. 686.)

SIXTH.

The Assignments of Error are sufficient to raise the questions discussed in our principal brief and passed upon by the court below.

The Circuit Court of Appeals in disposing of the case held the assignments of error to be sufficient to raise the questions which we have discussed in our principal brief; and this court having ordered this case here to review the questions passed upon by the court below, the sufficiency of the assignments of error in that court will not be reviewed or considered here. But the assignments of error are sufficient to raise the questions which were presented to the court below and decided, and which are presented here.

1. The first question: *Do the findings of fact support the judgment as to the items of $9,558.63 for nut-locks, and $40,000 for overtime penalty?* is raised by the findings themselves, the exception to the ruling of the court in refusing to order judgment for the defendant, and in ordering judgment for the plaintiff. (*Rec. pp.* 220, 223, 224, 226-9), and by the several assignments of error, particularly the *sixth*, *seventh*, *eighth*, *ninth* and *eleventh* assignments of error (*Rec. p.* 479), and the *thirty-sixth* and *thirty-seventh* assignments of error (*Rec. p.* 488).

2. The second question: *Is there any legal evidence to support the findings and the judgment entered thereon as to the item of $2,425 for bridge timber alleged to have been wrongfully converted by the Company in June, 1888?* is raised by the refusal to find, as requested, that the defendant did not ,in the month of June, 1888, or at any other

time, wrongfully or otherwise take possession of any timber belonging to the plaintiff, or convert the same to its use for the purposes of repairing a washout or otherwise (*Request No. 37, Rec. p.* 211), the exception thereto (*Exception No. 27, Rec. p.* 263, *also Exception No.* 17, *Rec. p.* 456), and the several assignments of error, particularly the *seventy-fourth* assignment of error (*Rec. p.* 501).

These exceptions and assignment of error were based expressly upon the ground that there was no proof in the case to sustain the findings that the defendant wrongfully or otherwise took or appropriated the timber in question. Manifestly, they present questions of law.

3. The third question: *Whether in an action on contract the complaint may be amended on the trial against the objection of the defendant by adding thereto a cause of action in tort, and a recovery allowed on such additional count?* is raised by the motion made at the close of plaintiff's case to amend his complaint. (*Rec. p.* 280), the objection thereto *Rec., p.* 282), the overruling thereof (*Rec. p.* 284, the exception thereto *Rec. p* 285), the motion in arrest of judgment, the denial thereof, and the exception thereto. (*Rec. pp.* 225-226), and by the *sixteenth*, *seventeenth* and *eighteenth* assignments of error. (*Rec. pp.* 481-482.)

It should be born in mind that this cause came on for trial and was heard at a regular term of the Circuit Court of the United States for the Southern District of New York, before Brown, District Judge, without a jury, (*a trial by jury having been expressly waived by the written consent of the parties filed with the clerk of the court*); that upon such trial each and every of the several rulings and decisions of the referee as contained and appearing in the case and bill of exceptions, and the decisions, findings, and con-

clusions of law of the referee were made the ruling, decision, finding of fact and conclusions of law of the court (*Rec. pp.* 221–225). This being the state of the record, the rulings, decisions, findings of fact and conclusions of law so made by the Circuit Court are reviewable here.

Revised Statutes of the United States, Sections 649 and 700;

Paine v. *Railroad Company*, 118 U. S., 152–158.

Shipman v. *Mining Company*, 158 U. S., 356.

Roberts v. *Benjamin*, 124 U. S., 64.

Board of Comrs. v. *Sherwood*, 64 Fed Rep., 103–105.

SEVENTH.

The dispute between Clark and the Company over the nut locks and overtime penalty, which existed prior and up to the time of the settlement, having been in good faith, and such a dispute as might legitimately and fairly have been brought by either party into court, had no settlement been made, it is wholly immaterial to the consideration of this case that ten years subsequent to the settlement the court, after a protracted and closely contested litigation, has found the fact and the law, over which such dispute was raged, in favor of Clark.

As Thompson, J., remarked in *Union Bank of Georgetown* v. *Geary*, 5 Peters, 99, 114:

> "And to permit a subsequent judicial decision on this point in their favor, as having a retrospective effect, so as to annul a settlement or agreement made by them under a different state of things, would be sanctioning a most mischievous principle."

Lord Hardwicke, in *Stapleton* v. *Stapleton*, 1 Atkyns, p. 12, following a previous decision of Lord Macclesfield, said:

> "An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreements of the parties, for the right must always be on the one side or the other, and, therefore, the compromise of a doubtful right is a sufficient consideration of an agreement."

And in Chitty on Contracts, 11 Edition (note) 1, p. 46, it is said:

> "The real consideration which each party receives under the compromise, being not the sacrifice of the right, but the settlement of the dispute, and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, *and that the other had no right whatever.*"

And Justice Miller, in U. S. *v.* Child, 12 Wall. 245, said:

> "It is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. After the compromise that question was no longer open to inquiry. It is the very essence of such adjustments of disputed rights that the contest shall be closed."

And LaCombe, J., in his opinion (Rec. 525), says:

> "Of course, it makes no difference that eventually it turns out that some supposed legal defence of the debtor is held to be insufficient; if he is in a position to litigate in good faith and with *some* color of right,

> and gives up his right to throw the claim into court, he gives a valuable consideration for any settlement, and no claim to which such a defence may be interposed can be fairly called a liquidated claim, even to the extent to which the debtor may have theretofore expressed his willingness to pay. '*If it appears that the claim furnished opportunity for controversy, although a favorable result could not have been safely predicted * * * sufficiency of consideration woula be established.*' "

Applying the rule here announced, the settlement between Clark and the Company is supported by a sufficient consideration; for it is found as a fact that the claims for nut locks and overtime forfeiture were in dispute between them at and prior to the time of the settlement. It likewise appears that these claims were asserted in good faith by the Company, and if they had not been allowed by Clark it could have litigated them "*in good faith and with some color of right.*" They were, as stated by LaCombe, J. (Rec. 517), "*legitimate matters of dispute, and unless settled by agreement of the parties might fairly be brought by either party into court.*"

These items of the account being in dispute, and disputed in good faith, the balance due on the account between Clark and the Company was necessarily in dispute. This dispute the parties adjusted between themselves, Clark conceding the facts to be as the Company claimed them, and neither fraud nor duress nor mistake having intervened, it is wholly immaterial that the court has found at the end of long and expensive litigation the facts in favor of Clark. By the settlement Clark conceded the facts to be as claimed by the Company, and therefore allowed the claims in full,

for the *facts* upon which the claims were based, and not the *amount* of the claims were in dispute.

To apply the rule announced by Mr. Justice Miller in U. S. *v.* Child & Co., *supra*, to this case:

> "In this view of the case, it is of no value to urge that the court has found the facts in favor of Clark, and that he ought not to have allowed the claims. After the compromise that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that this contest shall be closed."

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